Supreme Court, U.S.
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OFFICE OF THE CLERK
No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1994

PUBLIC UTILITY DISTRICT NO. 1 OF
SNOHOMISH COUNTY, WASHINGTON,

Petitioner

vs.

CLASS PLAINTIFFS IN MDL-551;
CHEMICAL BANK; and
WASHINGTON PUBLIC UTILITIES GROUP,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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39pp

QUESTIONS PRESENTED

1. In conformity with Lehman Bros. v. Schein, 416 U.S. 386 (1974), should the Court of Appeals have certified a controlling question of Washington State law to the Washington Supreme Court for resolution pursuant to its statutory certification procedures?

2. Did the Court of Appeals, in refusing to certify a controlling question of Washington law to the Washington Supreme Court for resolution (thereby ignoring the Rules of Decision Act, 28 U.S.C. section 1652), so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?[1]

3. Properly applying to Rules of Decision Act, under Washington law is petitioner entitled to entity reimbursement coverage under its insurance policies?

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[1]The parties below are named in the title of this petition. Petitioner has no parent or subsidiaries.

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PUBLIC UTILITY DISTRICT NO. 1 OF
SNOHOMISH COUNTY, WASHINGTON,

Petitioner

vs.

CLASS PLAINTIFFS IN MDL-551;
CHEMICAL BANK; and
WASHINGTON PUBLIC UTILITIES GROUP,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The memorandum decision and judgment of the Court of Appeals for the Ninth Circuit are printed in Appendices A and B. The order on denial of rehearing is printed in Appendix C. The orders of the district court are printed in Appendices D and E.

JURISDICTION

The memorandum decision of the Court of Appeals was filed on November 4, 1994 (Appendix A), and its order denying rehearing was filed on March 22, 1995 (Appendix C). Its judgment was entered on April 14, 1995 (Appendix B). This Court has jurisdiction pursuant to section 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

Section 1652 of Title 28 of the United States Code:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Section 2.60.020 of the Revised Code of Washington:

> "When in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer to the question of local law involved and the supreme court shall render its opinion in answer thereto."

STATEMENT OF THE CASE

The Memorandum Decision of the Court of Appeals summarizes the pertinent facts and district court proceedings:

"In 1982 and 1983, the Snohomish PUD obtained successive one-year, claims-made policies from Harbor Insurance Company.[2] Each policy provides for $10 million in coverage. The present dispute involves insurance proceeds paid into escrow by Harbor Insurance Company. Section A of the Harbor Insurance policies provides coverage to the Snohomish PUD in the event it indemnifies its officers or directors. Section B provides for direct coverage to the individual officers and directors. The policies state that if section A coverage applies, section B coverage is excluded.

"In March 1983, securities fraud litigation was commenced on behalf of purchasers of bonds which were issued to finance the construction of two nuclear power projects. In August 1988, four individuals who were either directors or on the participant committee of the Snohomish PUD settled with the plaintiffs. Pursuant to the settlement, the four individuals assigned any rights they possessed under any insurance policies to the plaintiffs. The Harbor Insurance policies purchased by the Snohomish PUD were included within the assignment.

"In November 1988, the WPUG, the Klickitat PUD, the Franklin PUD, the United States, and the State of Washington entered into a Memorandum of Understanding ("MOU") with the plaintiffs. The MOU provided that the plaintiffs would assign to the Snohomish PUD 'the

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[2]The Snohomish PUD also obtained an excess policy from First State Underwriters, That policy is not the subject of this appeal.

proceeds of the "Snohomish" insurance policies . . . previously assigned to Plaintiffs pursuant to certain previously executed settlement agreements . . . .' In a subsequent settlement agreement between these parties, the agreement recites the obligation of the plaintiffs to assign certain policies to the Snohomish PUD. The agreement, however, also notes that pursuant to a settlement agreement with the Snohomish PUD, the Snohomish PUD released the plaintiffs from the obligation to assign the proceeds. The agreement then assigned to the WPUG and the Klickitat PUD 'a 50% interest in the net proceeds of any recovery' obtained under the Harbor Insurance policies.

"The Snohomish PUD entered into a settlement agreement with the plaintiffs in April 1989. The agreement expressly released the plaintiffs from assigning to the Snohomish PUD the plaintiffs' interests, if any, in the Harbor Insurance policies. In consideration for this release, the plaintiffs agreed to pay the Snohomish PUD the sum of $2,682,000.

"In November 1989, the Snohomish Claimants[3] and Harbor Insurance entered into a settlement agreement which provided Harbor Insurance would pay the Snohomish Claimants $9,958,485. After the Snohomish PUD voiced its intent to seek proceeds under the Harbor Insurance

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[3][The "Snohomish Claimants" refer to the plaintiffs in the underlying federal securities litigation, the Washington Public Utilities Group ("WPUG"), and Klickitat PUD.]

> policies, the sum was placed in escrow pending a resolution of the current dispute.
>
> "On November 27, 1992 the district court granted the Snohomish Claimants' summary judgment motion on their cross-complaint against the Snohomish PUD. On July 16, 1993, the district court found no just reason to delay an appeal of this order and, consequently, approved entry of judgment pursuant to Federal Rule of Civil Procedure 54(b). The appellant filed a timely notice of appeal."

Appx. A, pp. 3-4.

Snohomish PUD and the "Snohomish Claimants" had made cross-motions for summary judgment; the district court, whose jurisdiction was based on diversity of citizenship, denied Snohomish's motion and granted the cross-claimants'. Snohomish PUD appealed both rulings; the Court of Appeals affirmed the order and denied Snohomish PUD's petition for rehearing.

Snohomish PUD's claim for coverage under section A (entity reimbursement for indemnity coverage) is based on three points:

1. Snohomish PUD's $46 million settlement payment *forgave* its four individuals and released them from claims-over by Snohomish. Under Washington case law, this invokes the entity reimbursement for indemnity coverage of the policies, and the Court of Appeals' refusal to certify this question to the Washington Supreme Court is the basis for this certiorari petition;

2. Snohomish PUD sufficiently raised an issue of material fact that it made a claim for section A indemnity coverage during the effective period of the policies; and

3. Snohomish PUD's settlement payment was also on behalf of and secured the release of two more of its individual employees who had not previously settled nor made a claim on the policies, thereby directly invoking entity reimbursement coverage.

REASONS FOR GRANTING CERTIORARI

Decisions of the Ninth Circuit Court of Appeals have been a frequent subject of review by this Court in the exercise of its power of supervision. This is a $20 million[4] case involving the application of Washington law among Washington public entities. Although it should be clear under Washington case law precedents that Snohomish PUD has established its right to entity indemnity reimbursement coverage under the policies, the Ninth Circuit has purported to distinguish those precedents on specious bases, and has abused its discretion by refusing to certify to the Washington State Supreme Court under its certification procedures the simple question of whether, under those precedents, Snohomish PUD has effectively indemnified its individuals under Washington law.

The Court of Appeals has thus misapplied the Rules of Decision Act, 28 U.S.C. section 1652, and has ignored Lehman Bros. v. Schein, 416 U.S. 386 (1974), stating no reasons for its refusal to certify the state law question when requested by petitioner. Lehman was a diversity of citizenship

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[4]$10 million escrowed by Harbor plus another $10 million in coverage on the excess policy issued by First State, which will almost certainly follow the result as to Harbor.

case involving state law, and this Court granted certiorari and remanded the case for reconsideration of whether there should be certification to state court. It held that certification "does, in the long run, save time, energy and resources and helps build a cooperative judicial federalism." 416 U.S. at 391.

Certification is particularly appropriate where, as here, the question "is one in which state governments have the highest interest" -- in this instance the insurability of their political subdivisions. Elkins v. Moreno, 435 U.S. 647, 662 (1978).

I

THE WASHINGTON SUPREME COURT WOULD RULE ON CERTIFICATION THAT SNOHOMISH PUD EFFECTIVELY INDEMNIFIED ITS INDIVIDUALS BY RELEASING ITS CLAIMS-OVER FOR INDEMNITY AGAINST THEM

Under Washington case law, the insured District need not actually indemnify its officers. Snohomish PUD, in its settlement with the MDL-551 plaintiffs, released its claims against the individual officers and directors, i.e., Snohomish forgave its claims against them. Under Washington Hospital Liability Insurance Fund v. Public Hospital District of Clallam County, 795 P.2d 717 (Wash. App. 1990), this entitled Snohomish to entity indemnity reimbursement coverage. In that decision, the insurer sued the insured entity for a declaration of coverage on a policy like Snohomish PUD's, including entity reimbursement for indemnity of its officers. The district asserted and then forgave a claim against one of its officers, and made a claim on the policy. Despite the facts that the individual had never suffered a loss and the district had not in fact indemnified him (two factors the Court of Appeals found decisive in affirming the summary judgment against Snohomish PUD), the court held that the district was

permitted to recover for its own loss under the entity indemnity coverage of the policy. This decision was in accord with WPUDUS v. PUD No. 1 of Clallam County, 112 Wash.2d 1, 771 P.2d 701 (1989).

Contrary to the Ninth Circuit's memorandum decision, these Washington precedents cannot be distinguished on the basis that there the insureds had brought direct claims against their employees. The formal filing of a "claim" by an entity obviously holding such a claim was not essential to either decision. The Harbor policy at bar covers losses by Snohomish PUD for indemnifying claims against the individuals in connection with any action "with which they are threatened." The individuals were obviously threatened with a claim-over by their employer for implied indemnity, and they knew it and obtained an indemnity from the MDL-551 plaintiffs for such claim-over. The formal lodging of a claim or filing of a complaint was not necessary under the policy or required by the case law.

II

IN ANY EVENT, THE NINTH CIRCUIT SHOULD HAVE CERTIFIED THE QUESTION OF ENTITY INDEMNITY COVERAGE TO THE WASHINGTON SUPREME COURT

At the very least the Ninth Circuit should have certified this important Washington State indemnity law issue to the Washington Supreme Court pursuant to Revised Code of Washington sections 2.60.010 through 2.60.030 (see Statutory Provisions Involved, p.2 above). The U. S. Supreme Court's decision in Lehman Bros. v. Schein, 416 U.S. 386, 94 S.Ct. 1741 (1974) "is a clear direction to the courts of appeal to look favorably on the use of certification procedures in diversity cases which present difficult issues of state law," 1A

Moore's Federal Practice, 2d ed., ¶ 0.203[5]. The Ninth Circuit has used the certification procedure in numerous cases, with salutary results. See, e.g., Toner for Toner v. Lederle Laboratories, 779 F.2d 1429 (9 Cir. 1986); Meckert v. Transamerica Ins. Co., 742 F.2d 505 (9th Cir. 1984). With $20 million at stake in this diversity jurisdiction insurance indemnity case, turning on a critical question of state law affecting its municipalities, the Ninth Circuit ought to have certified the question to the Washington Supreme Court.

III

THE LOWER COURTS' DECISIONS OVERLOOK THAT SNOHOMISH PUD IN FACT INDEMNIFIED TWO OF ITS OFFICERS

Snohomish PUD, in its settlement of MDL-551, indemnified its individuals Rice and Quast, who were not WPPSS directors and had not settled, by paying the MDL-551 plaintiffs for those two individuals' release. It was not necessary for Snohomish to give the money to the individuals for them to pay over to the plaintiffs for their release; Snohomish could and did pay it directly, for their benefit. The Ninth Circuit's memorandum decision, by focusing on only the other four Snohomish individuals who settled and assigned their claims (Mem. pp. 4-5), ignores the fact that the other two, Rice and Quast, did face a loss for which Snohomish PUD indemnified them (under the Washington cases cited in part I, above), by paying for their release and agreeing to drop its claim-over for indemnity against them.

IV

SNOHOMISH PUD HAS SUFFICIENTLY RAISED AN ISSUE OF MATERIAL FACT THAT IT MADE A CLAIM FOR SECTION A INDEMNITY COVERAGE DURING THE EFFECTIVE PERIOD OF THE POLICIES

It was alleged by the plaintiff First State Underwriters in its complaint in this action and admitted by Snohomish in its answer and by the "Snohomish Claimants" in adopting Snohomish PUD's answer that the original notice of claim was tendered "by and on behalf of Snohomish;" that in March 1983, MDL-551 was filed, naming Snohomish PUD as a defendant; and that on March 11, 1983, Snohomish PUD gave notice of that litigation to Harbor.

The Ninth Circuit, by focusing only on an August 19, 1983 letter referencing only section B of the policies, ignored not only the above pleading admissions, but also the following undisputed facts, which establish that there can be no summary judgment on undisputed facts as to whether Snohomish PUD made a claim for section A coverage during the policy period.

The 1983 letter simply reflects that, **until Snohomish PUD itself settled over five years later, in 1989, the entity reimbursement coverage (coverage A) of the policies was not triggered.** In 1983, Snohomish PUD obviously did not know whether and under what conditions it might settle MDL-551. Moreover, both parts A and B of the Harbor policy provide that if during the policy period (1983) any insured receives notice from a third party intending to hold the directors and officers responsible for a covered act (i.e., the MDL-551 complaints), and gives notice to the insurer, then any subsequent claim arising out of the same act "shall for the

purpose of this policy be treated as a claim made within the period of this policy." In 1983, Snohomish tendered MDL-551 to its insurer, Harbor, and that tender was for wrongful acts that were the subject of B coverage and would become the subject of A coverage when the entity indemnity occurred in 1989. Were it otherwise, entity reimbursement coverage, always coming later than the initial claim against the individual, would evaporate if the reimbursement occurred after the one-year policy period.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DENNIS K. BROMLEY
Counsel of Record

Counsel for Petitioner

DONALD J. HALE
Of Counsel

FILED
NOV 7 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIRST STATE UNDERWRITERS AGENCY OF NEW ENGLAND REINSURANCE CORPORATION, Plaintiff, v. PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, Defendant-Appellant, v. CLASS PLAINTIFFS IN MDL-551; CHEMICAL BANK, as Bond Fund Trustees and Attorney in Fact for Bondholders; WASHINGTON PUBLIC UTILITIES GROUP, Defendants-Intervenors and Cross-Claimants-Appellees.	No. 93-35711 D.C. No. CV-84-00498-BJR MEMORANDUM*

Appendix A-2

Appeal from the United States District Court
for the Western District of Washington
William D. Browning, District Judge, Presiding
Argued and Submitted September 15, 1994
Seattle, Washington

Before: BROWNING and CANBY, Circuit Judges,
and HUFF, District Judge **

INTRODUCTION

Appellant Public Utility District No. 1 of Snohomish County, Washington, (the "Snohomish PUD") appeals the district court's grant of summary judgment in favor of the Snohomish Claimants.[1] Because we conclude the Snohomish PUD did not indemnify its officers or directors, we affirm the district court's grant of summary judgment.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Marilyn L. Huff, District Judge, United States District Court for the Southern District of California, sitting by designation.

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[1] The Snohomish Claimants consist of the plaintiffs involved in the underlying federal securities litigation, the Washington Public Utilities Group (the "WPUG"), and the Klickitat Public Utility District (the "Klickitat PUD").

Appendix A-3

BACKGROUND

In 1982 and 1983, the Snohomish PUD obtained successive one-year, claims-made policies from Harbor Insurance Company.[2] Each policy provides for $10 million in coverage. The present dispute involves insurance proceeds paid into escrow by Harbor Insurance Company. Section A of the Harbor Insurance policies provides coverage to the Snohomish PUD in the event it indemnifies its officers or directors. Section B provides for direct coverage to the individual officers and directors. The policies state that if section A coverage applies, section B coverage is excluded.

In March 1983, securities fraud litigation was commenced on behalf of purchasers of bonds which were issued to finance the construction of two nuclear power projects. In August 1988, four individuals who were either directors or on the participant committee of the Snohomish PUD settled with the plaintiffs. Pursuant to the settlement, the four individuals assigned any rights they possessed under any insurance policies to the plaintiffs. The Harbor Insurance policies purchased by the Snohomish PUD were included within the assignment.

In November 1988, the WPUG, the Klickitat PUD, the Franklin PUD, the United States, and the State of Washington entered into a Memorandum of Understanding ("MOU") with the plaintiffs. The MOU provided that the plaintiffs would assign to the Snohomish PUD "the proceeds of the 'Snohomish' insurance policies ... previously assigned to

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[2] The Snohomish PUD also obtained an excess policy from First State Underwriters. That policy is not the subject of this appeal.

Plaintiffs pursuant to certain previously executed settlement agreements...." In a subsequent settlement agreement between these parties, the agreement recites the obligation of the plaintiffs to assign certain policies to the Snohomish PUD. The agreement, however, also notes that pursuant to a settlement agreement with the Snohomish PUD, the Snohomish PUD released the plaintiffs from the obligation to assign the proceeds. The agreement then assigned to the WPUG and the Klickitat PUD "a 50% interest in the net proceeds of any recovery" obtained under the Harbor Insurance policies.

The Snohomish PUD entered into a settlement agreement with the plaintiffs in April 1989. The agreement expressly released the plaintiffs from assigning to the Snohomish PUD the plaintiffs' interests, if any, in the Harbor Insurance policies. In consideration for this release, the plaintiffs agreed to pay the Snohomish PUD the sum of $2,682,000.

In November 1989, the Snohomish Claimants and Harbor Insurance entered into a settlement agreement which provided Harbor Insurance would pay the Snohomish Claimants $9,958.485. After the Snohomish PUD voiced its intent to seek proceeds under the Harbor Insurance policies, the sum was placed in escrow pending a resolution of the current dispute.

On November 27, 1992, the district court granted the Snohomish Claimants' summary judgment motion on their cross-complaint against the Snohomish PUD. On July 16, 1993, the district court found no just reason to delay an appeal of this order and, consequently, approved entry of judgment pursuant to Federal Rule of Civil Procedure 54(b). The appellant filed a timely notice of appeal.

DISCUSSION

We review de novo a grant of summary judgment. Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339 (9th Cir. 1989). Under Federal Rule of Civil Procedure 56(c), to succeed on a motion for summary judgment, the movant must first demonstrate "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.Pro. 56(c). If the movant meets this initial burden, the nonmovant then must demonstrate summary judgment is not appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). To make such a showing, the nonmovant must go beyond the pleadings to designate specific facts showing a genuine issue for trial. Id.

The Snohomish PUD argues it is entitled to the Harbor Insurance proceeds because it indemnified the four individual defendants who settled with the plaintiffs. We conclude the district court properly determined the Snohomish PUD had not indemnified its officers or directors and, thus, the Snohomish PUD is not entitled to the proceeds under the Harbor Insurance policies.

As found by the district court, the individual defendants did not suffer any loss for which the Snohomish PUD reimbursed them. The Snohomish PUD has not presented sufficient facts to raise a genuine issue of fact that it indemnified the individuals. The indemnification provision in the Harbor Insurance policies requires the insurance company to reimburse the Snohomish PUD when the insured indemnifies its officers or directors "for damages, judgments, settlements, costs, charges, or expenses" relating to a covered claim. In other words, the individual director or officer must suffer a loss that the insured has repaid. In this case, however, the individual directors and officers of the Snohomish PUD

did not suffer such a loss. The Snohomish PUD gave up the money it might otherwise have received as the result of the relinquished claim, but that was a direct loss, not a derivative loss due to indemnification.

Further, the Harbor Insurance policies are claims-made policies. The Snohomish PUD has not presented sufficient facts to raise a genuine issue of fact that it presented a claim based on indemnification for section A coverage during the effective period of the policies. Instead, a letter submitted from the Snohomish PUD to Harbor Insurance, on August 19, 1983, appears to reference only section B of the policies. This section provides direct coverage to the officers and directors and does not provide for coverage in the event the Snohomish PUD indemnifies its officers or directors. The letter references "Harbor Insurance Company, Policy No. HI 156948 B."

Finally, the authorities cited by the Snohomish PUD do not support its argument that, by releasing its right to sue the individual defendants, the Snohomish PUD in effect indemnified the individuals. In Public Util. Dists. Utils. Sys. v. Public Util. Dist. No. 1, 771 P.2d 701 (Wash. 1989), and Washington Hosp. Liab. Ins. Fund v. Public Hosp. Dist. No. 1, 795 P.2d 717 (Wash. App. 1990), the courts addressed whether a particular policy covered an insured's request for indemnity when the insured brought a direct claim against its employee. The cases, however, do not support the assertion that an entity has indemnified an individual if the entity releases or forgives its claims against the individual. We, therefore, conclude the district court properly granted the Snohomish Claimants' motion for summary judgment.

AFFIRMED.

Appendix B-1

JUDGMENT

MAR 31 1995
MANDATE ISSUED
_x_ FILED
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APR-3 1995
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COSTS TAXED

NO. 93-35711
CT/AG#: CV-84-00498-BJR

FIRST STATE UNDERWRITERS AGENCY OF NEW ENGLAND REINSURANCE CORPORATION,

Plaintiff,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON,

Defendant-Appellant

v.

CLASS PLAINTIFFS IN MDL-551; CHEMICAL BANK, as Bond Fund Trustees and Attorney in Fact for Bondholders; WASHINGTON PUBLIC UTILITIES GROUP,

Defendants-Intervenors and
Cross-Claimants-Appellees.

Appendix B-2

APPEAL FROM the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered November 7, 1994.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

MAR 31 1995

by: [Signature]
Deputy Clerk

FILED
MAR 22 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIRST STATE UNDERWRITERS AGENCY OF NEW ENGLAND REINSURANCE CORPORATION,	)	No. 93-35711
Plaintiff,	)	D.C. No. CV-84-00498-BJR
v.	)	ORDER*
PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON,	)	
Defendant-Appellant,	)	
v.	)	
CLASS PLAINTIFFS IN MDL-551; CHEMICAL BANK, as Bond Fund Trustees and Attorney in Fact for Bondholders; WASHINGTON PUBLIC UTILITIES GROUP,	)	
Defendants-Intervenors and Cross-Claimants-Appellees.	)	

Before: BROWNING and CANBY, Circuit Judges, and HUFF, District Judge **

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Marilyn L. Huff, District Judge, United States District Court for the Southern District of California, sitting by designation.

The petition for rehearing is denied.

X FILED X ENTERED
___ LODGED ___ RECEIVED
DEC 03 1992
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

FIRST STATE UNDERWRITERS AGENCY OF NEW ENGLAND REINSURANCE CORPORATION, Plaintiff, v. PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY; et al., Defendants.	No. C84-498 ORDER
AND RELATED CROSS-CLAIMS	

Pending before the Court are: (1) the Snohomish Claimants' Motion for Summary Judgment on Cross-Claim Against Snohomish; and (2) Snohomish P.U.D.'s Motion for Summary Judgment on Cross-Claim. For the following reasons, the Court will deny Snohomish P.U.D.'s Motion and grant the Snohomish Claimants' Motion.

Appendix D-2

ORDER AND OPINION

In the MDL-551 action, the settlement terms offered to Snohomish P.U.D. in the November 1988 Memorandum of Understanding, entered into by plaintiffs, Klickitat, and WPUG, obligated the plaintiffs to assign their interest[1] in the Harbor policies to Snohomish P.U.D. When Snohomish P.U.D. settled, however, it released plaintiffs from their obligation to assign the Harbor policies to it in return for a $2,682,000.00 cash equivalent credit. Snohomish P.U.D. would have this Court believe that it got $2,682,000.00 credited against the total settlement amount of $48,862,000.00 in return for permitting the plaintiffs to retain the Harbor policies' Section B coverage assigned by the individual Snohomish P.U.D. defendants. Here, Snohomish P.U.D. argues that Section B coverage is excluded on the basis of its claim for Section A coverage. Under this reasoning, if the plaintiffs agreed to credit Snohomish P.U.D. in the amount of $2,682,000.00 for only the Section B coverage, they made a very poor deal. The Court, however, believes otherwise. The Court concludes that Snohomish P.U.D. released all of its rights to proceeds form the Harbor policies when it settled with the MDL-551 plaintiffs.

In addition, the Court finds that there was no effective indemnification. Snohomish Resolution No. 2675 demonstrates that Snohomish P.U.D. agreed to indemnify its directors, officers, and employees to the extent that there was no insurance coverage. The Court, in its February 7, 1988 Order,

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[1] The individual defendants (WPPSS directors and members of the Participants' Committee) had previously assigned their interest in the Harbor policies to the plaintiffs under the Individuals' Settlement.

ruled that the immunity of the individual defendants was waived only "to the extent of available purchased insurance coverage." Thus, the individual Snohomish P.U.D. defendants did not incur any loss for which Snohomish P.U.D. reimbursed them. The Court is not persuaded that *Washington Hosp. Liab. Ins. Fund v. Public Hosp. Dist. No. 1 of Clallam County*, 795 P.2d 717 (Wash. Ct. App. 1990), supports Snohomish P.U.D.'s argument that it may forgive its claims against its directors, officers, and commissioners and thereby suffer a loss, which triggers a right to indemnification.

CONCLUSION

Accordingly, for these and all the other reasons set forth in the Snohomish Claimants' papers, IT IS ORDERED that:

(1) Snohomish P.U.D.'s Motion for Summary Judgment on Cross-Claim is DENIED; and

(2) the Snohomish Claimants' Motion for Summary Judgment on Cross-Claim Against Snohomish is GRANTED.

Dated this 27 day of November 1992

[Signature]
William D. Browning
U.S.District Judge

___ FILED ___ ENTERED
_X_ LODGED ___ RECEIVED Hon. Barbara J. Rothstein
JUL 15 1993
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

	)	No. C 84-498
FIRST STATE UNDERWRITERS	)	
AGENCY OF NEW ENGLAND	)	
REINSURANCE CORPORATION,	)	STIPULATION
Plaintiff,	)	AND ORDER
vs.	)	
	)	(Rule 54(b),
PUBLIC UTILITY DISTRICT NO. 1	)	Fed.R.Civ.P.)
OF SNOHOMISH COUNTY, et al.,	)	
Defendants,	)	
and	)	
	)	
CLASS PLAINTIFFS IN MDL-551,	)	
CHEMICAL BANK and	)	
WASHINGTON PUBLIC UTILITIES	)	
GROUP,	)	
Intervenor-Defendants	)	
and Cross-Claimants.	)	
	)	

Appendix E-2

A. STIPULATION

Plaintiff First State Underwriters Agency of New England Reinsurance Corporation, defendants Public Utility District No. 1 of Snohomish County, Washington, et al. ("Snohomish") and Intervenor Defendants and Cross-Claimants[1] hereby stipulate as follows:

Whereas, the Court has granted summary judgment in favor of the Intervenors and against Snohomish on the Intervenors' cross-complaint in intervention, and has denied Snohomish's cross-motion for summary judgment against the Intervenors on that cross-complaint;

Whereas, Plaintiff First State Underwriters and the Intervenors as Cross-Defendant on the complaint have settled their dispute in this action, conditioned on the final outcome of the dispute between Snohomish and the Intervenors; and

Whereas, Plaintiff, Defendants and the Intervenors believe that a Rule 54(b) final judgment as to the Intervenors' cross-complaint will facilitate the prompt resolution of this action and the administration of justice,

---

[1]The Intervenors consist of the Class Plaintiffs in In re Washington Public Power Supply System Securities Litigation, MDL-551; Chemical Bank, as Bond Fund Trustee and Attorney-in-Fact for all WNP 4/5 Bondholders; and The Washington Public Utilities Group (WPUG), a group of utilities which were named as defendants in MDL-551 (these utilities are identified in Exhibit A to this stipulation).

Now, therefore, the parties stipulate that the Court may and should enter the following Rule 54(b) judgment in this action.

Dated: July 13, 1993.

SIFF ROSEN, P.C.

by [signature]
Mark S. Landman
Attorneys for Plaintiff

MILBERG WEISS BERSHAD SPECTHRIE & LERACH

by [signature]
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Richard W. Clary
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PILLSBURY MADISON & SUTRO

by [signature]
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GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON & DAHEIM

by [signature]
Kenneth G. Kieffer
Attorneys for Intervenor WPUG

B. ORDER

Whereas, by order dated November 27, 1992 and filed December 3, 1992 the Court (W.D. Browning, J.) granted the Intervenors' ("Snohomish Claimants") Motion for Summary Judgment on Cross Claim against Snohomish P.U.D. and denied Snohomish's motion for summary judgment; and

Whereas, the plaintiff and the Intervenors have conditionally settled and the parties have stipulated to entry of a Rule 54(b) judgment as to the cross claim:

It is hereby expressly determined that there is no just reason for delay in the entry of a judgment until final determination of all the issues in this action; and its is hereby ORDERED, ADJUDGED AND DECREED that a judgment be entered granting summary judgment in favor of Intervenors on their cross-claim against Snohomish and denying Snohomish's cross-motion for summary judgment, based on this Court's order dated November 27, 1992 and filed December 3, 1992, and the clerk is directed to enter such judgment forthwith.

It is further ORDERED that Plaintiff's claims against the Intervenors are dismiss with prejudice.

Dated: July 16, 1993.

[Signature of Barbara J. Rothstein]
United States District Judge

Appendix E-5

EXHIBIT A

Public Utility District No. 1 of Benton County
Public Utility District No. 1 of Clark County
Public Utility District No. 1 of Cowlitz County
Public Utility District No. 1 of Grays Harbor County
Public Utility District No. 1 of Lewis County
Public Utility District No. 3 of Mason County
Public Utility District No. 1 of Okanogan County
Public Utility District No. 2 of Pacific County
Public Utility District No. 1 of Skamania County
Public Utility District of Wahkiakum County
City of Ellensburg, Washington
City of Tacoma, Washington
Public Utility District No. 1 of Klickitat County

(2)

No. 94-2093

Supreme Court, U.S.
FILED
JUL 19 1995
CLERK

In The

Supreme Court of the United States

October Term, 1994

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON,

Petitioner,

vs.

CLASS PLAINTIFFS IN MDL-551; CHEMICAL BANK; and WASHINGTON PUBLIC UTILITIES GROUP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

LIST OF PARTIES

CORPORATE DISCLOSURE STATEMENT
REQUIRED BY F.R.APP.P. 26.1

1. The following appellees are Washington State public utilities and municipalities:

Public Utility District No. 1 of Benton County
Public Utility District No. 1 of Clark County
Public Utility District No. 1 of Cowlitz County
Public Utility District No. 1 of Grays Harbor County
Public Utility District No. 1 of Lewis County
Public Utility District No. 3 of Mason County
Public Utility District No. 1 of Okanogan County
Public Utility District No. 2 of Pacific County
Public Utility District No. 1 of Skamania County
City of Ellensburg, Washington
City of Tacoma, Washington
Public Utility District No. 1 of Klickitat County.

2. Certain other appellees are the named class plaintiffs in *In re Washington Public Power Supply System Securities Litigation*, MDL551. None of those named plaintiffs has issued shares to the public.

3. Manufacturers Hanover Trust Company (whose successor by merger is Chemical Bank) identifies the following parent companies, subsidiaries and affiliates:

Chemical Banking Corporation
Brown & Company Securities Corporation
CBC-USA, Inc.
CBC Capital Partners, Inc.
CBC Holding (Delaware) Inc.

Chemical Bank Delaware
CBD Holdings Ltd.
SFC Agency, Inc. (OH)
Chemical DATA Services Corporation
Chemical Insurance Agency, Inc.
The CIT Group Holdings, Inc.
Chatham Ventures, Inc.
Chemadvertising, Inc.
Chemical Bank
Chemical Bank National Association
Margaretten Financial Corporation
Chemical Residential Mortgage Corporation
Margaretten Insurance Agency, Inc.
MRG Finance Company
Margaretten Financial Services
Margaretten Realty Co.
Chemical Business Credit Corp.
Chemical Capital Corporation
Chemical Capital Financing, Ltd.
Chemical Commercial Real Estate Advisors, Inc.
Chemical Connecticut Corporation
Chemical Educational Services Corporation
Tuition Plan Financial Services, Inc.
Chemical Equity Incorporated
Chemical Venture Capital Corporation
Chemical Corporate Advisers, Inc.
Chemical Financial Services, Inc.
Chemical Financial Services Corporation, Ltd.
Chemical Financial Services Corporation (AZ)
Chemical Financial Services Corporation (CA)
Chemical Financial Services Corporation (FL)
Chemical Financial Services Corporation (GA)
Chemical Financial Corporation (IL)
Chemical Financial Services Corporation (NC)
Chemical Financial Services Corporation of Penn.

Chemical Financial Services Corporation (TX)
Chemical Financial Services Corporation (WA)
Chemical Financial Services Corporation (CO)
Chemical Financial Services Corporation (IN)
Chemical Financial Services Corporation (KY)
Chemical Financial Services Corporation (LA)
Chemical Financial Services Corporation (SC)
Chemical Financial Services Corporation (TN)
Chemical Financial Credit Services Corporation (KY)
Sun States Life Insurance Company
Great Lakes Insurance Company
Lorry, Ltd.
Chemical Financial Investment Corporation
Chemical Financial Services Corporation (OH)
Chemical Financial Acceptance Corporation (OH)
Chemical Futures, Inc. (Inactive)
Chemical Futures & Options, Inc.
Chemical Futures Management, Inc.
Chemical Holding Delaware, Inc.
CBC Holdings (California), Inc.
Van Deventer & Hoch Chemical Thrift Holdings, Inc.
Chemical Bank F.S.B.
Chemical Trust Company of California
Chemical Investments, Inc.
Chemical International
Capital Finance Limited
Chemical Mortgage Securities
Chemical New Jersey Holdings, Inc.
Chemical Bank New Jersey National Association
Chemical Investor Services, Inc.
Princeton Bank and Trust Company
National Association Chemical New York, Inc.
Chemical New York-N.V.
Chemical Real Holdings, Inc.
Chemical Realty Corporation

Chemical Securities, Inc.
Chemical Structured Municipal Products Corporation
Chemical Securities Holdings, Inc.
Chemical Shareholders Services of California, Inc.
Chemical Shareholder Services Partners Inc.
Chemical Mellon Shareholder Services (50%)
Chemical Technologies Corporation
Electronic Customer Services, Inc.
Chemical Temporaries Incorporated
Chemical Trading Management Corporation
COREQ, Inc.
CVP Management Corp.
Manufacturers Hanover Leasing International Corp.
Manufacturers Hanover Leasing (Nassau) Limited
Manufacturers Hanover Arrendamento Mercantil S.A.
Manufacturers Hanover Wheelease Inc.
MH World Trade Corporation Mexico
Offshore Equities, Inc.
The Andean Fund, Inc.
Equifio
Chemical Overseas Holdings, Inc.
Select Andean Holdings, Inc.
Select Brazilian Holdings, Inc.
Chempar Participacoes e Emprendementos Ltd.
Select Capricorn Holdings, Inc.
Select Cassiopeia Holdings, Inc.
Select Life Holdings, Inc.
Select Orion Holdings, Inc.
Select Pacific Holdings, Inc.
Select Rio Grande Holdings, Inc.
Select Southern Holdings, Inc.
Select Southern Star Holdings, Inc.
Sociedad Mexicana Para La Industria Y El Comercio S.A.
The Portfolio Group, Inc.
Texas Commerce Equity Holdings, Inc.

Texas Commerce Operating Services Inc.
Chemical Securities of Texas, Inc.
First City
Texas-Fiduciary Services, Inc.
Texas Commerce Equities Inc.
Pyramid Agency, Inc.
Texas Commerce Information Systems, Inc.
Texas Commerce Bank Foundation, Inc.
Texas Commerce Funding Company
TexCom Venture Capital, Inc.
Texas Commerce Shareholders Company
Texas Commerce Services Company
Texas Commerce Leasing Company
Texas Commerce Investment Management Co.
Texas Commerce Bank-San Angelo, N.A.
Texas Commerce Trust Company of New York
Texas Commerce Bank National Association Houston
Texas Commerce Equipment Leasing Company
Texas Commerce International Leasing Company
Texas Commerce Investment Company

Chemical Bank owns a fifty percent interest or more in the following subsidiaries:

CB Capital Investors, Inc.
Chemical Acceptance Corporation
Chemical Acceptance Corporation I
Chemical Mortgage Acceptance Corporation
Chemical Bank of Canada
Chemical Clearing House Services, Inc.
Chemical Commercial Mortgage Banking Corp.
Chemical Commercial Mortgage Securities Corp.
Chemical Community Development, Inc.
Chemco Intemational, Inc.
Chemical International Finance, Ltd.

Banco Chemical (Portugal) S.A.
Chemical Bank-France
Chemical Bank A.G.
Chemical Investment Bank Limited
Chemical Bank CB, S.A.
Chemical Global Investors Limited
Chemical Investment Services Corp.
Chemical Mortgage Company
Chemgraphics Systems, Inc.
ChemLease Worldwide, Inc.
ChemNetwork Processing Services, Inc.
Chem Credit, Inc.
Manufacturers Hanover Leasing Corporation
MH Financial Management Systems, Inc.

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TABLE OF CITATIONS

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Perkins v. Clark Equipment Co., 823 F.2d 207 (8th Cir. 1987)	5

No. 94-2093

In The

Supreme Court of the United States

October Term, 1994

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON,

Petitioner,

vs.

CLASS PLAINTIFFS IN MDL-551; CHEMICAL BANK; and WASHINGTON PUBLIC UTILITIES GROUP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

All Respondents respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner.

STATEMENT OF THE CASE

Respondents agree with Petitioner that the Memorandum Decision of the Court of Appeals adequately summarizes most of

the pertinent facts and District Court proceedings. The sole basis for the Petition, however, is that the United States Court of Appeals for the Ninth Circuit should have certified an allegedly controlling question of Washington state law to the Washington State Supreme Court for resolution. Accordingly, it is important for this Court to understand when Petitioner first raised that claim during the proceedings below.

On November 27, 1992, the District Court granted Respondents' summary judgment motion on their cross-complaint against Petitioner. On July 16, 1993, the District Court found no just reason to delay an appeal of this order and, accordingly, approved entry of judgment. At no time during any of the District Court proceedings did Petitioner ever suggest that the District Court certify any questions of state law to the Washington State Supreme Court.

All issues were fully briefed by both Petitioner and Respondents before the Court of Appeals, and this matter was argued in September, 1994. Prior to the Ninth Circuit's November 7, 1994 Memorandum Decision, Petitioner never requested the Court of Appeals to certify any allegedly controlling issues of Washington state law to the Washington State Supreme Court.

On November 21, 1994, Petitioner filed a Petition for Rehearing before the Court of Appeals. That Petition for Rehearing includes, for the first time, a request that the Court of Appeals certify the question of "entity indemnity coverage" to the Washington State Supreme Court.

SUMMARY OF ARGUMENT

This is not an appropriate case for review on *certiorari*. The issue of whether a federal court should certify state law issues to a

state court rests entirely in the sound discretion of the federal court.

> [P]articularly compelling reasons must be shown when certification is requested for the first time on appeal by a movant who lost on the issue below.

Complaint of McLinn, 744 F.2d 677, 681 (9th Cir. 1984).

Here, the issue of state law is not a close one, the issue is not important to Washington State in terms of comity, and the Court of Appeals acted well within its discretion in declining Petitioner's dilatory request for certification.

REASONS FOR DENYING THE WRIT

I.

THE DECISION WHETHER TO CERTIFY STATE LAW ISSUES TO A STATE SUPREME COURT LIES WITHIN THE DISCRETION OF THE FEDERAL COURT.

In *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974), this Court held that use of a state's certification procedure "rests in the sound discretion of the Federal Court."

In his concurring opinion, Chief Justice Rehnquist explored, in some detail, the scope of the discretion of federal judges in deciding whether to use state certification procedures.

> [A] sensible respect for the experience and competence of the various intregal parts of

the federal judicial system suggests that we should go slowly in telling the courts of appeals or the district courts how to go about deciding cases where federal jurisdiction is based upon diversity of citizenship, case in which they see and decide far more than we do.

* * *

State certification procedures are a very desirable means by which a district court may ascertain an undecided point of state law, especially where . . . the question can be certified directly to the court of last resort within the State. *But in a purely diversity case such as this one, the use of such a procedure is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of our federal-state jurisprudence.*

* * *

If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used. *The question of whether certification on the facts of this case, particularly in view of the lateness of its*

> *suggestion by petitioners, would have advanced the goal of correctly disposing of this litigation on the state law issue is one which I would leave, and I understand that the Court would leave, to the sound judgment of the court making the initial choice.*

Id. at 393-95 (emphasis added).

The Court of Appeals here properly exercised its discretion not to certify any state issues, where the request for certification was first made before the Court of Appeals on a motion for reconsideration of its decision.

> The practice of requesting certification after an adverse judgment has been entered should be discouraged. Otherwise, the initial federal court decision will be nothing but a gamble, with certification sought only after an adverse decision. Once a decision is submitted for decision in the district court, the party should be bound by the outcome unless other grounds for reversal are present. Only in limited circumstances should certification be granted after a case has been decided. [Citations omitted.]

Perkins v. Clark Equipment Co., 823 F.2d 207, 209-210 (8th Cir. 1987). *See Complaint of McLinn, supra,* 744 F.2d at 681.

II.

THE COURT OF APPEALS EMPLOYED AN EMINENTLY REASONABLE INTERPRETATION OF STATE LAW.

The only issue which Petitioner eventually wanted certified to the Washington State Supreme Court involved a mundane interpretation of a settlement agreement and two insurance policies. The Court of Appeals, after reviewing well-established Washington state law, clearly and correctly determined that Petitioner's position was simply not well founded.

> Finally, the authorities cited by the Snohomish PUD do not support its argument that, by releasing its right to sue the individual defendants, the Snohomish PUD in effect indemnified the individuals. In *Public Util. Dists. Utils. Sys. v. Public Util. Dist. No. 1*, 771 P.2d 701 (Wash. 1989), and *Washington Hosp. Liab. Ins. Fund v. Public Hosp. Dist. No. 1*, 795 P.2d 717 (Wash. App. 1990), the courts addressed whether a particular policy covered an insured's request for indemnity when the insured brought a direct claim against its employee. The cases, however, do not support the assertion that an entity has indemnified an individual if the entity releases or forgives its claims against the individual. We, therefore, conclude the district court properly granted the Snohomish Claimants' motion for summary judgment.

See Appendix A-6 to the Petition for Writ of Certiorari.

Both the District Court and the Court of Appeals carefully considered and rejected Petitioner's state law indemnity arguments. Moreover, the Court of Appeals correctly exercised its discretion in rejecting Petitioner's last-minute request for certification.

CONCLUSION

The Court of Appeals acted completely in accord with the accepted and usual course of judicial proceedings in rejecting the certification request. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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